Indian Claims Commission

Commission des revendications des Indiens

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE CLAIM OF THE MIKISEW CREE FIRST NATION

March 1997

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March 27, 1997

Chief and Council
Mikisew Cree First Nation

The Honourable Ron Irwin
Minister of Indian Affairs and Northern Development

The Honourable Allan Rock
Minister of Justice and Attorney General of Canada

Re: Mikisew Cree First Nation
Economic Benefits under Treaty 8

The Mikisew Cree First Nation initiated proceedings before this Commission by letter dated February 23, 1996, from Jerome N. Slavik, Counsel for the Mikisew Cree First Nation, to the Indian Claims Commission. On November 18, 1996, Ron Maurice, Counsel for the Indian Claims Commission informed the parties that Co-Chair Daniel J. Bellegarde had considered written submissions from the parties regarding a mandate challenge brought forth by Canada, and that the Commission would proceed with this Inquiry.

On December 16, 1996, John Sinclair, Assistant Deputy Minister wrote to Chief Archie Waquan of the Mikisew Cree First Nation, informing him that Canada was prepared to accept the Economic Benefits under Treaty 8 Claim for negotiations. In view of this claim being accepted, the Commission has taken no further steps to inquire into the First Nation's claim.

.../2

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Our review of the history of this claim and summary of the events are contained in the attached report that we are now honoured to present to you.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde	P.E. James Prentice	Carole T. Corcoran
Commission Co-Chair	Commission Co-Chair	Commissioner

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE CLAIM OF THE MIKISEW CREE FIRST NATION

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To the Indian Claims Commission
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March 1997

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PART I

INTRODUCTION

In January 1993, the Mikisew Cree First Nation submitted a specific claim to the Minister for Indian Affairs and Northern Development,[1] seeking the provision of economic benefits under Treaty 8. The First Nation was informed in March 1994 that the Department of Indian Affairs and Northhern Development (DIAND) had made a preliminary decision to reject the claim,[2] but neither party appeared to consider this decision to be final. More correspondence and meetings followed, and in mid-June 1995 DIAND indicated that it was willing to discuss the First Nation's claim under the Specific Claims Policy (subject to formal acceptance).[3] In responding to later enquiries by the First Nation, Canada took the position that acceptance of the claim for negotiation was in abeyance until a policy review of economic benefits claims was completed.[4]

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1 Statement of Claim, Mikisew Cree First Nation, Re: Failure of the Crown in Right of Canada to Provide Collective Economic Benefits Pursuant to Treaty 8, January 1993 (ICC Documents, pp. 83-140). A Band Council Resolution dated December 9, 1992, had authorized the submission of the claim (ICC Documents, pp. 81-82). See also the covering letter, Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to Manfred Klein, Specific Claims West, referring to an enclosed Band Council Resolution and the Statement of Claim, January 12, 1993 (ICC Documents, pp. 182-83). A subsequent letter requests an amendment to the Statement of Claim, such amendment acknowledging an annual allocation of ammunition to the Band: Jerome Slavik to Manfred Klein, January 22, 1993 (ICC Documents, p. 184).

2 The writer of the letter had qualified the decision as a "preliminary" one; effectively he invited the First Nation to pursue the claim further by submitting more evidence or written argument. Allan Tallman, Specific Claims West, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers and Solicitors, March 29, 1994 (ICC Documents, pp. 193-94).

3 Rem Westland, Director General, Specific Claims Branch, DIAND, to Chief Archie Waquan, June 12, 1995 (ICC Documents, pp. 412-13).

4 Mike Bouliane, Specific Claims Branch, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers and Solicitors, February 7, 1996 (ICC Documents, p. 426).

On February 23, 1996, in the absence of a clear decision from the Minister on whether the claim would be accepted for negotiation, the First Nation asked the Indian Claims Commission (the Commission) to conduct an inquiry. The basis for the request was that the Department's conduct and delay were tantamount to a rejection of the claim.[5]

Canada's response, on learning of the request, was that the Commission had no authority to consider the matter, since the First Nation's specific claim had not actually been rejected.[6] Each party submitted written arguments to the Commission. In mid-November 1996, Commission counsel advised the First Nation and Canada that a decision had been made to proceed with the inquiry requested by the First Nation.[7] A planning conference had already been held in June 1996, and a community session was scheduled for late November 1996.[8]

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[5] Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to the Indian Claims Commission, February 23, 1996 (ICC Documents, pp. 427-28).

[6] François Daigle, Counsel, Department of Justice, to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Claims Commission, June 12, 1996 (ICC Documents, pp. 464-74). The writer stated that "Canada does not agree or admit that the claim has been rejected. The claimant has been advised that the acceptance of the claim for negotiation has been postponed pending the results of a review of the issue from a policy perspective. The matter is still under review."

[7] Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, and to François Daigle, Counsel, Specific Claims Ottawa, November 18, 1996. See Appendix A to this report.

[8] See Indian Claims Commission, Planning Conference, Mikisew Cree First Nation, Treaty Entitlement to Economic Benefits, Ottawa, June 14, 1996 (ICC Documents, p. 550).

On November 20, 1996, the Commission received word that Canada had accepted the claim for negotiation.[9] Canada's formal offer to negotiate was dated December 16, 1996.[10] A meeting between the parties was planned for February 3, 1997.[11]

This report sets out the background to the First Nation's claim and is based entirely on the documents the First Nation provided to the Commission. In view of Canada's decision to accept the claim, no further steps have been taken by the Commission to inquire into the First Nation's claim, and we make no findings of fact. This report is meant simply to advise the public that the First Nation's claim has been accepted for negotiation under the Specific Claims Policy.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. Order in Council PC 1992-1730 empowers the Commission to inquire into and report on whether or not Canada properly rejected a specific claim:

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9 Facsimile Transmission Sheet, Mamawi Developments Ltd., Fort Chipewyan, Alta, to Indian Claims Commission, Ottawa, with attached letters: (1) Dawn Waquan, Coordinator/Researcher, Mikisew Cree First Nation, to Indian Claims Commission, November 19, 1996; and (2) John Sinclair, Assistant Deputy Minister, Claims and Indian Government, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, November 7, 1996.

10 John Sinclair, Assistant Deputy Minister, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, December 16, 1996 (Appendix B).

11 Ian Gray, Senior Negotiator, Specific Claims Branch, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, January 17, 1997.

> AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[12]

If the Commission had completed the inquiry into the Mikisew Cree First Nation's claim, the Commissioners would have evaluated that claim based upon Canada's Specific Claims Policy. DIAND has explained that policy in a booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[13] In particular, the government says that when considering specific claims:

> it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> . . .

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[12] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 21, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[13] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982).

THE CLAIMS PROCESS

As outlined in *Outstanding Business*, a First Nation may submit its specific claim to the Minister of Indian Affairs, who acts on behalf of the Government of Canada. The claimant First Nation begins the process by submitting a clear and concise statement of claim, along with a comprehensive historical and factual background on which the claim is based. The claim is referred to DIAND's Specific Claims Branch (formerly Office of Native Claims). Specific Claims generally conducts its own confirming research into a claim, makes claim-related research findings in its possession available to the claimants, and consults with them at each stage of the review process.

Once all the necessary information has been gathered, the facts and documents will be referred by Specific Claims to the Department of Justice (Justice) for advice on the federal government's lawful obligation. Generally, if Justice finds that the claim discloses an outstanding lawful obligation, the First Nation is advised, and Specific Claims will offer to enter into compensation negotiations.

The present claim was first submitted to the Minister in January 1993. Three years later, the First Nation had not received any definite answer as to whether its claim would be accepted for negotiation. In February 1996, the First Nation asked the Commission to conduct an inquiry into the merits of the claim, based on the argument that DIAND's delay was sufficient to bring the claim within the Commission's authority.

PART II

HISTORICAL BACKGROUND

BACKGROUND TO THE FIRST NATION'S CLAIM

The Mikisew Cree First Nation is located in northeastern Alberta and was previously known as the Fort Chipewyan Cree Band. Most of the First Nation's 1874 members live off reserve in Fort Chipewyan. The First Nation's reserve lands were not set aside for it until the late 1980s.[14]

The First Nation's representatives signed Treaty 8 in 1899. The treaty included the following obligations which were undertaken by Canada:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves . . . and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty . . . the selection of such reserves, and lands in severalty, . . . to be made . . . after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.
>
> . . .
>
> FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.
>
> FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat . . . and to every family one cow, and every Chief

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[14] Statement of Claim, paragraph 2 (ICC Documents, p. 84); A. Tallman (Specific Claims West), "Mikisew Cree First Nation, Collective Economic Benefits Pursuant to Treaty No. 8 – Preliminary Analysis," October 20, 1993 (ICC Documents, p. 144).

> one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.[15]

The last of these clauses sometimes is referred to as a "cows and ploughs" entitlement.

The Report of Commissioners for Treaty No. 8 seems to indicate that the Commissioners understood that it was unlikely that any of the Bands would make immediate requests for reserve lands, or for the related economic benefits:

> The assistance in farming and ranching is only to be given when the Indians actually take to these pursuits, and it is not likely that for many years there will be a call for any considerable expenditure under these heads. . . .
>
> The Indians are given the option of taking reserves or land in severalty. . . .[A]s the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. . . .[16]

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[15] *Treaty No. 8*, IAND Publication No. OS-0576-000-EE-A-16, Appendix I to the First Nation's Statement of Claim (ICC Documents, pp. 99-100).

[16] Report of Commissioners for Treaty No. 8, Appendix I to the First Nation's Statement of Claim (ICC Documents, p. 94).

In 1922 the First Nation asked for reserve lands to be set aside. The Indian Agent responsible for the Band commented on the request:

> To protect their interests, as guaranteed by treaty, both [the Chipewyan and Cree of Fort Chipewyan Bands] asked for a reserve, not for farming, as they had no wish to farm, nor is the land suited for that purpose, but for hunting and trapping. To make the matter definite, I requested both bands to apply for a reservation, naming the area selected. This application has been received and is herewith attached.[17]

Reports for that year, and the next, indicate that both Bands wanted reserve lands to be set aside. Five years later, the Agent's Report indicates that no reserve lands had been set aside for either and notes that the Fort Chipewyan Cree were no longer interested in the establishment of reserve lands.[18]

In 1986, Canada and the Cree Band of Fort Chipewyan came to an agreement dealing with the Band's reserve land entitlement under Treaty 8.[19] The preamble to

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[17] This statement is contained in the April 1995 report prepared by Specific Claims West: "Economic Benefits and Treaty No. 8 Bands in Alberta 1899-1940, The Crees of Fort Chipewyan (Mikisew)" (ICC Documents, p. 306). The statement is attributed to G. Card, reporting to the Assistant Deputy and Secretary of the Department of Indian Affairs, August 15, 1922, National Archives of Canada [hereinafter NA], RG 10, vol. 6921, file 770/28-3 pt 2).

[18] These statements are contained in the April 1995 report prepared by Specific Claims West, "Economic Benefits and Treaty No. 8 Bands in Alberta 1899-1940, The Crees of Fort Chipewyan (Mikisew)" (ICC Documents, pp. 306-07). A corroborating source for the fiscal year 1922-23 is the Annuity Payment Officer's Report, August 11, 1922, NA, RG 10, vol. 6921, file 779/28-3 pt 2. For the fiscal year 1923-24, the source is a report from Const. R.A. Williams to Fitzgerald, Officer Commanding the Royal Canadian Mounted Police, August 6, 1923, NA, RG 10, vol. 6921, file 779/28-3 pt 2. For the fiscal year 1927-28, the source is the Agent's Report on Annuity Payments, 1927, NA, RG 10, vol. 6921, file 779/28-3 pt 2.

[19] Agreement, between Her Majesty the Queen in Right of Canada and the Cree Band of Fort Chipewyan, December 23, 1986.

the Agreement states that the Crown's undertakings in Treaty 8 included the obligation to "lay aside reserves for such bands as desire reserves. . . which may be found suitable and open for selection" and that the Crown "ha[d] not fulfilled her obligations to the Cree Band in accordance with the aforementioned undertaking."[20] Since these obligations had not been met, Canada agreed to set aside reserve land (including land within the boundaries of Wood Buffalo National Park), to guarantee certain wildlife harvesting rights to the First Nation, to authorize and pay the costs of every boundary survey required for the Agreement, and to pay cash compensation in the amount of $24 million.

The 1986 Agreement also contains a clause releasing the Crown from any further obligations arising out of the clause in Treaty 8 which obliged the Crown "to lay aside reserves for such bands as desire reserves . . . [or] to provide land in severalty. . . ." The release states:

> It is understood by the Parties that this Agreement and in particular the covenants contained herein are for total satisfaction of all obligations of Her Majesty relating to land contained in the aforementioned part of the said Treaty[21] and all manner of costs, legal fees, travel and expenses expended by the said Band or its representatives for the purpose of coming to this Agreement.[22]

There was no mention in the release clause of Canada's obligations to provide the agricultural (economic) benefits contemplated by Treaty 8, and the release clause

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20 Agreement, December 23, 1986, pp. 1-2.

21 That part of Treaty 8 dealt only with the setting aside of reserve lands for a band, the provision of land in severalty to individual families or band members, and the manner of selection of such lands. See clause 11 of the 1986 Agreement.

22 Agreement, December 23, 1986, clause 11.

did not refer to any claims which the First Nation might bring other than in relation to land.

First Nation's Statement of Claim

The Statement of Claim[23] refers to more than 60 years of "persistent efforts and requests" by the First Nation to have reserve lands set aside. Even though they were requested, the Treaty 8 "collective economic benefits" were not paid or delivered to the First Nation since no reserve lands were set aside before the 1986 Agreement. The claimant says that the Band has no record of ever receiving the economic benefits that were promised, except for an annual allocation of ammunition.[24] No elder or band member has any recollection of those other benefits having been received by the First Nation.[25]

The First Nation submitted that since the Minister is in the position of a fiduciary, the Minister must demonstrate that the economic benefits the First Nation is claiming were actually paid or delivered to the Band. The claimant says that the 1986 *Agreement* dealt with compensation only for the First Nation's loss of the use and benefit of reserve lands. It pointed out that Canada settled the economic benefits claims of the Woodland Cree and Lubicon Lake Bands for $25,000 per band member, but, since the Mikisew First Nation was an original party to Treaty 8, rather than a

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23 Statement of Claim, January 1993 (ICC Documents, pp. 83-140), incorporating the amendment requested January 22, 1993 (ICC Documents, p. 184).

24 Statement of Claim, as amended by the January 22, 1993, letter from Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to Manfred Klein, Specific Claims West (ICC Documents, p. 184).

25 Statement of Claim, paragraph 4 (ICC Documents, p. 85).

band adhering to the treaty sometime after 1889 (as did the Woodland Cree and Lubicon Lake Bands), its grievance has a comparatively longer history.[26]

The Statement of Claim seeks the prompt recognition and fulfilment of the First Nation's specific claim, namely compensation for the First Nation's loss of the use of, and benefit from, Treaty 8's economic benefits, and argues that the Crown should now provide these collective economic benefits to the Mikisew Cree First Nation "in a contemporary manner and form acceptable to [the] First Nation."[27]

In a sworn statement, Chief Archie Waquan, of the Mikisew Cree First Nation, says that "[t]he first time I was apprised of our First Nation's entitlement to certain economic benefits under the terms of *Treaty 8*, including the 'ploughs and cows' provisions, was in 1991" and that "[t]o the best of my knowledge or recollection such benefits have never been provided to the Mikisew Cree First Nation."[28]

The 1995 Specific Claims West Report

The report prepared by Specific Claims West for the Mikisew claim includes the following observations and conclusions:

> As this reference [in the Report of Commissioners for Treaty No. 8] makes clear, the government never contemplated a blanket distribution of agriculturally-related economic benefits to Treaty No. 8 bands. Instead, it planned to provide such economic benefits only when the individual bands satisfied the conditions of the Treaty for the receipt of such benefits.

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[26] Statement of Claim, paragraph 7 (ICC Documents, p. 86)

[27] Statement of Claim, paragraph 13 (ICC Documents, p. 88).

[28] Paragraphs 8 and 10 of the Statutory Declaration of Archie Waquan, dated February 21, 1995 (ICC Documents, pp. 271-72).

. . .

> . . . extant correspondence and other records leave little doubt that for the most [part] Chiefs and headmen spoke frankly with visiting representatives of the Department about bands' needs and wants and that those representatives typically facilitated most specific band requests. The main exception to this accommodation involved requests for farm equipment and livestock from bands judged to be inadequately prepared to undertake agriculture on a full-time basis.
>
> . . .
>
> The economic situation of the Crees of Fort Chipewyan was [that] they had always found their livelihood in the hunting, fishing and trapping resources of the surrounding area. . . . the Crees had requested a reserve in 1922 because they feared losing access to traditional resources and not because they had any interest in farming. There are few records documenting economic benefits asked for and received by this Band and only one deals with farm-related goods or services. Instead, the surviving records emphasize the receipt of ammunition and fishing twine into the 1940s.[29]

COMMUNICATIONS BETWEEN THE PARTIES

Approximately three years elapsed from the time the First Nation submitted the initial economic benefits claim to the Minister for Indian Affairs to when it was determined that the Commission would hold an inquiry. During this period Canada and the First Nation had an exchange of correspondence.

The First Nation's first Statement of Claim is dated January 1993. Late in October 1993, the First Nation received a summary of the claim from Specific Claims West.[30] After Specific Claims West received the First Nation's response to the

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[29] Specific Claims West, "Economic Benefits and Treaty No. 8 Bands in Alberta, 1899-1940, April 1995" (ICC Documents, pp. 282, 285, 304).

[30] Allan Tallman, Assistant Negotiator, Specific Claims West, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, October 20, 1993, and accompanying document, "for discussion purposes only," "Mikisew Cree First Nation,

summary, the claim was referred to Justice for an opinion whether there was "a lawful obligation under the Specific Claims Policy."

Justice's opinion became known at the end of March 1994: the claim had not established an outstanding lawful obligation on the part of Canada to the First Nation, since the nonfulfilment of a treaty or agreement between the First Nation and the Crown had not been shown.[31] Canada's position was that the Treaty 8 economic benefits could only be claimed once a band had made an election for reserve lands and chosen between agriculture and stock-raising. No reserve lands had been set aside until after the 1986 Agreement,[32] and there was no evidence of an election by the Band between agriculture and stock-raising. However, since this was Canada's "preliminary" position, the Band was invited to submit additional evidence or argument.

In April 1994, counsel for the First Nation rejected Canada's preliminary position and requested a meeting.[33] It appears that the parties then met for discussions in Fort McMurray on June 15, 1994. Chief Archie Waquan later set out the Mikisew position in writing and requested another meeting with Specific Claims West to clear away any remaining "impediments" to the claim. Chief Waquan said he did not think that any further archival research into the First Nation's receipt of agricultural

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Collective Economic Benefits Pursuant to Treaty No. 8 – Preliminary Analysis, October 20, 1993" (ICC Documents, pp. 141-92).

31 Allan Tallman, Specific Claims West, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, March 29, 1994 (ICC Documents, pp. 193-94).

32 See 1986 Agreement.

33 Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to A. Tallman, Specific Claims West, DIAND, April 11, 1994 (ICC Documents, pp. 195-96).

economic benefits would be necessary, since the setting aside of reserve lands, which had to happen before an election for agricultural benefits, had not taken place until after the 1986 Agreement.[34]

Correspondence on November 9, 1994, refers to a research report commissioned by Specific Claims West to determine the extent to which Treaty 8 bands were provided with economic benefits.[35] The draft of this report, entitled "Economic Benefits and Treaty No. 8 Bands in Alberta, 1899-1940," appears to have been circulated late in January 1995.[36] Two letters explained why Specific Claims West had taken the position that the research was necessary:

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[34] Chief Archie Waquan, Mikisew Cree First Nation, to Manfred Klein, Specific Claims West, DIAND, July 25, 1994 (ICC Documents, pp. 197-99, especially paragraph 9 at p. 199).

[35] Allan Tallman, Negotiator, Specific Claims West, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, November 9, 1994. As well, Specific Claims West wrote the Executive Director of the Athabasca Tribal Corporation on December 8, 1994, advising that research on the fulfilment of the economic benefits provisions of Treaty 8 was "currently well underway" and that the Tribal Corporation would be contacted once the research paper had been reviewed by Specific Claims West. Manfred P. Klein, Director, Specific Claims West, DIAND, to Tony Punko, Executive Director, Athabasca Tribal Corporation, December 8, 1994 (ICC Documents, pp. 208-09).

[36] B. Potyondi and T.M. Homik, "Economic Benefits and Treaty No. 8 Bands in Alberta, 1899-1940," draft report prepared for Specific Claims West, January 9, 1995 (ICC Documents pp. 214-66). The ICC Documents include a January 30, 1995, "without prejudice" covering letter from DIAND, with neither the addressee nor sender indicated, but apparently meant to accompany copies of the draft version of the research report. The letter specifies that, unlike the draft report, "[a] final report would contain statements which. . . have been confirmed in the historical record. . . ." The writer limits the purpose of the report to the "provi[sion of] background information to the issue of the distribution of economic benefits to the First Nations which signed Treaty 8 in Alberta" (ICC Documents, p. 267).

> The research will focus on determining whether there is evidence that individual bands made a request for particular economic benefits and evidence that any economic benefits were delivered.[37]
>
> The research is required because we want to deal definitively with the issue and not have it drag on for years to come to the detriment of the First Nation and we want to ensure that we have a well documented file when it is submitted to the Department of Justice for review and analysis.[38]

Late in January 1995 the Director General of the Specific Claims Branch of DIAND wrote to the Director of Specific Claims West setting out the approach of the Branch to economic benefits under treaty:

> One of the responsibilities of this branch is to assure that the [Specific Claims] Policy is not used inappropriately. For example this Policy is not intended to be a source of funding for economic development, though a First Nation may well want to direct compensation for a claim towards investments which will improve the economic development opportunities of its members.
>
> . . . In the case of claims for economic benefits under treaty . . . [w]e would require a demonstration that the benefits promised by treaty were requested by a First Nation at some point in history, and that the response(s) by Canada were of a kind which created an outstanding lawful obligation as may be assessed by DOJ [Department of Justice] under the criteria of the Policy.
>
> If the record shows that such benefits were never requested, and that what we are facing is a first time request, DOJ will still assess in the usual way whether a lawful obligation under the Policy exists. The

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37 Allan Tallman, Negotiator, Specific Claims West, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, November 9, 1994 (ICC Documents, pp. 200-01).

38 Manfred P. Klein, Director, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, November 25, 1994 (ICC Documents, p. 202).

> branch would not view such a claim as a high priority for the assignment of scarce time and resources, however.
>
> In either case I would expect DOJ and ourselves, to assess the extent to which Canada's support to the claimant First Nation(s) over time has effectively met the objective of the treaty provision(s). If the treaties promise implements to assist the transition to farming, for example, I think the record will show in most cases that Canada's support far exceeded a strict one-time provision of "cows and ploughs."[39]

The Director of Specific Claims West was authorized to share this letter with any interested First Nations representatives.[40]

In April 1995 a version of the January 1995 report was prepared by Specific Claims West for the Mikisew Cree First Nation with the title "Economic Benefits and Treaty No. 8 Bands in Alberta, 1899-1940: The Crees of Fort Chipewyan (Mikisew)." It seemed to confirm that the First Nation had not received any agricultural tools/implements, livestock, or seed under Treaty 8.[41]

Early in May 1995, the First Nation's Chief asked for a decision on the negotiation of the First Nation's claim for economic benefits.[42] The response from DIAND was equivocal. That letter, dated June 12, 1995, and marked "without prejudice," included the following:

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[39] Rem Westland, Director General, Specific Claims Branch, DIAND, to Manfred Klein, Director, Specific Claims West, January 27, 1995 (ICC Documents, pp. 210-13).

[40] Rem Westland, Director General, Specific Claims Branch, DIAND, to Manfred Klein, Director, Specific Claims West, DIAND, January 27, 1995 (ICC Documents, pp. 210-13).

[41] "Economic Benefits and Treaty No. 8 Bands in Alberta, 1899-1940: The Crees of Fort Chipewyan (Mikisew)," April 1995 (ICC Documents pp. 273-401).

[42] Chief Archie Waquan, Mikisew Cree First Nation, to Rem Westland, DIAND, May 5, 1995 (ICC Documents, p. 402).

> It is our view that there may be an obligation under Treaty 8 to provide the articles as specified in Treaty 8 to the MCFN [Mikisew Cree First Nation]. We further believe that the obligation is limited to the actual items mentioned in the treaty and to the number of families actually settled on the reserve.
>
> As discussed . . . there are . . . two options available to the First Nation. The First Nation may pursue the specific claims process or can await the outcome of (and/or participate in) the developing Indian-Government process to determine how treaties should be understood and implemented in contemporary terms.
>
> Subject to your agreement to proceed and a formal letter accepting your claim from DIAND's Assistant Deputy Minister of Claims and Indian Government, the Specific Claims Branch is prepared to enter into discussions concerning the First Nation's claim within the parameters of the Specific Claims Policy and DIAND's legal position. DIAND would view entering into discussion as part of unfinished business arising from the First Nation's 1986 treaty land entitlement settlement.
>
> DIAND anticipates that any settlement reached under the Specific Claims Policy will bear a direct relationship to the actual benefits specified in the treaty. This approach is in accord with the legal position that the department has received with respect to the interpretation of the treaty positions.
>
> To reiterate, your alternative is to participate in the planned treaty policy development process and to help determine in that context how economic benefit provisions of treaties might be assessed on a contemporary basis. If your expectation exceeds what could be provided under a specific claim (in return for a full release), it may be more appropriate for your First Nation to await the outcome of the treaties review process.[43]

The parties met on July 25, 1995, to discuss the claim. DIAND again stated its offer to negotiate the claim, still subject to the conditions set out in the June 12, 1995, letter. The Band was asked to confirm that its members wished to proceed under the

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[43] Rem Westland, Director General, Specific Claims Branch, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, June 12, 1995 (ICC Documents, pp. 412-13).

specific claims process and was told that an "acceptance package" would then be prepared. DIAND stated that any settlement "[would] have to bear a direct relationship to the actual benefits specified in the Treaty" and therefore would not follow the approach taken to value the economic benefits in other bands' treaty land entitlement settlements.[44]

In August 1995 the First Nation gave written confirmation that it wished to negotiate settlement of the claim "pursuant to the economic benefits provisions of Treaty 8, as set out in our Statement of Claim."[45] Correspondence over the next six months included a December 1995 letter from the First Nation asking what the status was of the promised acceptance package, a January 1996 letter from the First Nation requesting a meeting to obtain a "clear and straight answer" why the First Nation's claim was not being accepted for negotiation, and finally a February 1996 letter from the Specific Claims Branch saying that the "acceptance package" was in abeyance, since DIAND was reviewing the "whole issue of the entitlement to the economic benefits of Treaty No. 8 and other similar treaties . . . from a policy perspective." That letter stated that a decision was anticipated within the next three months.[46]

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[44] Manfred P. Klein, Director, [Specific Claims West], DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, August 2, 1995 (ICC Documents, pp. 418-19).

[45] Chief Archie Waquan, Mikisew Cree First Nation, to Manfred Klein, Specific Claims West, DIAND, August 17, 1995 (ICC Documents, p. 420).

[46] Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to Mike Bouliane, Acting Director, Treaty Land Entitlements, DIAND, December 19, 1995 (ICC Documents, p. 423). Chief Archie Waquan, Mikisew Cree First Nation, to Scott Serson, DIAND, January 22, 1996 (ICC Documents, pp. 424-25). Mike Bouliane, Specific Claims Branch, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers and Solicitors, February 7, 1996 (ICC Documents, p. 426).

PART III
ISSUES

The claim submitted by the Mikisew Cree First Nation to the Minister raised two issues: (1) whether, under Treaty 8, there was an existing and outstanding lawful obligation on the part of Canada to provide economic benefits to the First Nation; and (2) the nature and value of any such outstanding benefits. Since, at the date of this report, the Minister has agreed to negotiate the claim, there has been no Commission inquiry into either issue. We make no findings of fact nor any comment on the merits of the First Nation's claim for economic benefits under Treaty 8. This report has set out the background to the First Nation's claim, based on documents the First Nation provided.

The Commission's authority to conduct an inquiry into this claim was challenged by Canada, and this preliminary question was considered by the Commission. The Commission concluded that it had the authority to conduct an inquiry in these circumstances. Part IV of the report outlines the positions of the parties and the Commission's decision.

PART IV

THE COMMISSION'S AUTHORITY TO CONDUCT AN INQUIRY

As discussed above, the parties disagreed whether the facts of this case met the threshold for the Commission to conduct an inquiry. The question was whether the First Nation's claim *had been rejected* by the Minister. The claimant asked the Commission to conclude that DIAND's conduct in the three years since the First Nation submitted its claim was tantamount to a rejection.[47]

In March 1996, the Commission advised Canada that the First Nation had requested an inquiry.[48] In June 1996, Justice wrote to the Commission, explaining how Canada regarded the progress of the claim.[49] This letter asserted that the Band had been informed DIAND was prepared to recommend negotiation of the claim under the Specific Claims Policy. Moreover, since the Band disputed DIAND's "narrow and literal interpretation of the provisions of *Treaty 8*,"[50] the letter argued that the real issue was the different interpretations that each party had of Treaty 8 (rather than whether to negotiate at all). Counsel for Canada stated:

> Canada does not agree or admit that the claim has been rejected. The claimant has been advised that the acceptance of the claim for

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47 Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to the Indian Claims Commission, February 23, 1996 (ICC Documents, pp. 427-28).

48 Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Mike Bouliane, Acting Director General, Specific Claims Branch, and to W. Elliott, Senior General Counsel, DIAND, Legal Services, March 5, 1996 (ICC Documents, pp. 433-34).

49 A. François Daigle, Counsel, Specific Claims Ottawa, DIAND Legal Services, to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Claims Commission, June 12, 1996 (ICC Documents, pp. 464-74).

50 Citing an August 1, 1995, letter from Chief Archie Waquan, Mikisew Cree First Nation, to the Honourable Ron Irwin, Minister for Indian Affairs (ICC Documents, pp. 414-17).

> negotiation has been postponed pending the results of a review of the issue from a policy perspective. The matter is still under review.[51]

A planning conference for the Commission's inquiry into the First Nation's claim was held June 14, 1996. The First Nation had requested that a meeting with DIAND take place before the conference, in order to discuss the Department's "policy and approach" in the matter, or to discuss the stage reached in the Department's policy development on the issue of economic benefits claims.[52] In reply, the Specific Claims Branch confirmed that the acceptance package was being "held in abeyance pending a review of the issue by the department from a policy perspective" and that the review had not been completed within the three additional months as anticipated on February 7, 1996.[53]

In another letter, dated June 27, 1996, the Specific Claims Branch said that DIAND would not be able to announce its decision prior to July 31, 1996, but consideration of the claim was "ongoing." The First Nation's claim had not been rejected under the Specific Claims Policy; therefore, the Department was "unable to agree that [the] claim be 'deemed' rejected for the purposes of an inquiry by the

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51 A. François Daigle, Counsel, Specific Claims Ottawa, DIAND Legal Services, to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Claims Commission, June 12, 1996 (ICC Documents, p. 465).

52 Jerome Slavik, Ackroyd, Piasta, Roth & Day, to Michel Roy, DIAND, May 28, 1996 (ICC Documents, pp. 457-58).

53 Jerome Slavik, Ackroyd, Piasta, Roth & Day, to Michel Roy, DIAND, May 28, 1996 (ICC Documents, pp. 457-58). Michel Roy, Director General, Specific Claims Branch, to Chief Archie Waquan, Mikisew Cree First Nation, June 14, 1996 (ICC Documents, p. 475).

Commission."[54] On July 16, 1996, after the planning conference, the Commission asked the parties to make written submissions on the question of the Commission's authority to proceed with the inquiry.[55]

Before any submissions were received, the Director General of Specific Claims Branch wrote to the Chief of the Mikisew Cree First Nation suggesting that, since the internal policy paper had been completed, nothing should hold up the review of the claim:

> [I]t is my intention to have the issues raised by your specific claim considered by the Senior Policy Committee at a September meeting. Once we have obtained instructions, we should be in a position to resume and complete our review of your specific claim and advise whether we are prepared to enter into settlement negotiations pursuant to the Specific Claims Policy.
>
> . . .let me reiterate that the claim has not been rejected by Canada. We continue to work steadily toward our goal of resolving the outstanding policy issues raised by your specific claim.[56]

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[54] Michel Roy, Director General, Specific Claims Branch, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, June 27, 1996 (ICC Documents, pp. 481-82).

[55] Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Claims Commission, to Jerome Slavik, Ackroyd, Piasta, Roth and Day, Barristers & Solicitors, and to Francois Daigle, Counsel, Specific Claims Ottawa, DIAND Legal Services, July 16, 1996 (ICC Documents, pp. 491-92).

[56] Michel Roy, Director General, Specific Claims Branch, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, July 31, 1996 (ICC Documents, pp. 519-20).

THE FIRST NATION'S POSITION

The Mikisew Cree First Nation maintained that the Commission's mandate did extend to the particular facts surrounding the First Nation's specific claim.[57] Within the limits of the constituting Order in Council, it argued, the Commission is an investigative body with the discretion to decide its own jurisdiction and procedures. In particular, the Commission could determine what amounted to a "rejection" of a claim as contemplated by the phrase "already rejected by the Minister," i.e., according to the Terms of Reference).

Aside from verbal or written rejections of a claim, a person could conclude that a party had expressed its rejection by "action, inaction, or other conduct, such as the refusal or inability to make a decision . . . within a reasonable period of time, which is tantamount to a rejection, despite claims to the contrary." The First Nation argued that, even where no statutory time limit is placed on a Crown decision maker, previous court decisions indicate that the Crown's decision must be made within a reasonable time.

Counsel for the claimant argued that DIAND had already concluded that agricultural and farming entitlements had not been provided to the Mikisew Cree First Nation:

> After extensive research, DIAND concluded in 1994 . . . these entitlements were not provided to the MCFN. This finding should have very promptly led to an acknowledgement of an outstanding lawful and fiduciary obligation. Yet, after 3 1/2 years, DIAND has refused to acknowledge a lawful obligation in this matter. They have refused to

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[57] Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to Ron Maurice, Indian Claims Commission, August 15, 1996 (ICC Documents, pp. 556-64).

> either accept a lawful obligation, enabling the claim to proceed to negotiation, or outright reject the claim, thus allowing our client to proceed with alternative remedies, whether in court or before the ICC.[58]

Although the Crown must be given a reasonable time to assess its lawful obligation to the First Nation, in this case the policy issues which were explained as the reason for the government's delay in deciding whether to negotiate the claim (the first stage of the process) should have been left to the the next stage of the process. In other words, determining the settlement value of the claim was irrelevant to the question whether a "lawful obligation" existed.

The First Nation concluded that "the unwillingness, inability, and refusal [of the Minister] to decide, when combined with the extensive delay and other conduct of the Crown in this matter, [were] a breach of fiduciary conduct and obligation," and were tantamount to a rejection of the First Nation's claim by Canada.

CANADA'S POSITION

The starting point for Canada's written argument was that the Commission's role was "fundamentally linked and limited to reviewing Canada's application of the Specific Claims Policy" and that the question of the Commission's mandate to consider the First Nation's claim had to be considered in light of that limited role.[59] Canada

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[58] Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, to Ron Maurice, Indian Claims Commission, August 15, 1996 (ICC Documents, pp. 556-64).

[59] Submissions on Behalf of the Government of Canada with Respect to the Mandate of the Indian Claims Commission, August 1, 1996 (ICC Documents, pp. 530-38).

emphasized that in this case there was no documentary basis for concluding that the Mikisew Cree First Nation's claim had been rejected.[60]

Counsel for Canada argued that the relevant documentary evidence, which covered January 1993 to July 31, 1996, clearly showed that the First Nation's claim had not been rejected. What that correspondence did show was that Canada had not yet completed its review of the First Nation's claim; therefore, Canada had not decided whether to accept or reject the claim for negotiation.

Since the First Nation had made submissions to the Minister following the March 1994 letter outlining Canada's preliminary position, this action showed that the claimant never believed the claim had been rejected. The fact that there had been later meetings between the parties, and that the claimant had submitted additional evidence and arguments, also confirmed the ongoing review of the claim.

Canada argued that the "mandate" dispute between the parties did not have to do with a "rejection" of the claim; instead, Canada said that the First Nation was

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[60] Canada also distinguished the mandate challenge in this Mikisew case from that in the Lac La Ronge Candle Lake and Schools Inquiry where the Commission relied on correspondence from DIAND that had been written in the context of litigation as evidence of the rejection of a claim. In the Lac La Ronge Inquiry, the government had taken the position that, unless a rejection had taken place within the context of the specific claims process, it would not be a rejection which was within the Commission's Terms of Reference. Although the claims in issue had been explicitly rejected, in writing, by the Senior Assistant Deputy Minister of DIAND, the government's position was that this "rejection" was outside the "process." The government had also argued that the specific claims process could not operate while a claim was the subject of active litigation, which was the case for both of the claims. In the decision, on behalf of the Commissioners, Justice Robert Reid explained that the Commission's exercise of jurisdiction must above all else be governed by considerations of fairness. The Commissioners also did not accept that the specific claims and litigation processes must be mutually exclusive and, in any event, "[t]he Commissioners interpret their mandate as remedial. Accordingly, they interpret it broadly to achieve its objective, which is to ensure, to the best of their ability, that claims which may be reasonably considered to fall within it are disposed of fairly." The decision was that the Commission *did* have the authority to consider the claims (ICC Documents, pp. 403-10).

objecting to the time that DIAND had taken to respond to the claim. On February 7, 1996, the First Nation was told that review of the claim had been delayed while the Department conducted a policy review of treaty entitlements. The First Nation was also told that Specific Claims intended to complete the review as soon as possible, probably within three months. However, instead of waiting the three months, the First Nation had requested that the Commission conduct an inquiry. Since January 1993, when the claim was filed, there had been "numerous" meetings between the parties, and research and other reports had been obtained and shared with the First Nation. Even 11 months after August 1995, the evidence was that Canada was actively reviewing the claim; the Specific Claims Branch was "fully committed" to completing its review.

In conclusion, Canada argued that the facts showed that the claim had been, and still was, under active consideration. The Specific Claims Branch had continued to state that it was committed to having the First Nation's claim reviewed by senior department officials. DIAND's conduct, therefore, could not be seen as inaction tantamount to a rejection of the First Nation's claim.

THE COMMISSION'S DECISION

The Commission's decision to conduct an inquiry into the First Nation's claim was set out in a letter dated November 18, 1996 (attached as Appendix A to this report). It stated that the issue to be determined was whether DIAND's delay was tantamount to a rejection of the First Nation's claim. The history of the claim, including the main events and correspondence from January 1993 to July 24, 1996, was summarized. The letter concluded:

> After considering the nature of the issues involved and the amount of time that this claim has been under review by the Specific Claims Branch, Co-Chair Bellegarde concluded that Canada has had sufficient time to determine whether an outstanding "lawful obligation" is owed to the [First Nation]. Under the circumstances, he considered the lengthy delay as being tantamount to a rejection of the claim for the purposes of determining whether [the Commissioners] have authority to proceed with an inquiry under their terms of reference. . . . Furthermore, the inquiry has been scheduled in such a manner as to provide Canada with additional time to respond to the merits of the claim before proceeding with written and oral submissions. If Canada decides to accept the claim, it will not be necessary for the Commission to complete the inquiry.
>
> . . .
>
> . . . It is significant that the Specific Claims Branch initially offered to enter into negotiations with the Mikisew Cree First Nation under the policy on June 12, 1995 . . . Over seventeen months have passed and Canada has yet to respond to a discrete legal question, namely, whether the Mikisew Cree First Nation received any of the economic entitlements promised under Treaty 8. . . .
>
> . . . The claimant has provided enough information for Canada to make a decision and, indeed, no further requests for information have been made by Canada. Since Canada refused to provide a certain date within which to respond and has not offered any valid explanation for the delay, other than to say that it is under active review, it is justifiable to conclude that a seventeen month delay is tantamount to a rejection of the claim for the purposes of responding to the Mikisew Cree First Nation's request for an inquiry.[61]

A Commission community session was scheduled for November 26, 1996. On November 20, 1996, the Commission received word that Canada had accepted the

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[61] Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, and to François Daigle, Counsel, Specific Claims Ottawa, November 18, 1996. See Appendix A.

claim for negotiation,[62] and the community session was cancelled. Canada's formal offer to negotiate was dated December 16, 1996.[63] A meeting between the parties was planned for February 3, 1997.[64] As a result, the Commission has suspended this inquiry.

POSTSCRIPT

On December 20, 1996, in the period between Canada's December 16, 1996, offer to negotiate the First Nation's claim and the scheduled February 3, 1997, meeting, the First Nation began a lawsuit in the Alberta courts against Canada and the Province of Alberta. This litigation was filed by a firm other than the one handling the economic benefits claim.[65] The lawsuit alleges that the federal Crown and its representatives engaged in misrepresentation, intentional concealment of the facts, fraud, and other behaviour in breach of fiduciary obligations in the negotiation of Treaty 8, that both the federal and provincial Crowns are in breach of the terms of Treaty 8, that both the

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62 Facsimile Transmission Sheet, Mamawi Developments Ltd., Fort Chipewyan, Alta, to Indian Claims Commission, Ottawa, with attached letters: (1) Dawn Waquan, Coordinator/Researcher, Mikisew Cree First Nation, to Indian Claims Commission, November 19, 1996; and (2) John Sinclair, Assistant Deputy Minister, Claims and Indian Government, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, November 7, 1996. Canada's formal offer to negotiate was dated December 16, John Sinclair, Assistant Deputy Minister, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, December 16, 1996 (Appendix A).

63 John Sinclair, Assistant Deputy Minister, DIAND, to Chief Archie Waquan, Mikisew Cree First Nation, December 16, 1996.

64 Ian Gray, Senior Negotiator, Specific Claims Branch, DIAND, to Jerome Slavik, Ackroyd, Piasta, Roth & Day, Barristers & Solicitors, January 17, 1997.

65 *Chief Archie Waquan v. Her Majesty the Queen (Canada and Alberta)*, Action No. 9601-18174, Alberta Court of Queen's Bench, Judicial District of Calgary, filed and issued by Rath & Company, Barristers & Solicitors, Priddis, Alberta, December 20, 1996.

federal and provincial Crowns engaged in misrepresentation, intentional concealment of the facts, fraud, and other behaviour in breach of fiduciary obligations in the negotiation of the 1986 Agreement, and that both the federal and provincial Crowns are in breach of the 1986 Agreement. In particular, this Statement of Claim seeks general and aggravated damages (each in the amount of one billion dollars), an order of specific performance in accordance with the terms of Treaty 8, and a declaration that the Treaty 8 obligation to provide lands to the First Nation is in fact an obligation in perpetuity.

In light of this lawsuit, Canada has declined to negotiate the First Nation's claim for economic benefits, at least until the implications of the lawsuit have been "fully analyzed." At the date of this report, the Commission understands that Canada and the First Nation have not begun negotiating the First Nation's claim for economic benefits.

PART V

CONCLUSION

In light of Canada's offer to accept the Mikisew Cree First Nation's claim for negotiation under the Specific Claims Policy, it is no longer necessary for an inquiry to be held into this matter. In making this report, we wish to affirm that it is essential that process and systemic issues in the specific claims process, such as the development of government policy regarding a certain category of claim, not be allowed to frustrate the timely acceptance or rejection for negotiation of individual claims, or frustrate the timely negotiation and settlement of those claims that have been accepted by Canada for negotiation. At a minimum, delay must be explained by something more than an assertion that a claim is "under active review," and projected completion dates should be met, or, at the least, failure to meet those dates must be explained in a meaningful manner. Just as fairness was the criterion governing the decision to conduct a Commission inquiry into the First Nation's claim, fairness to the parties must be the criterion that guides the conduct of either party seeking the resolution of a First Nation's claim.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde	**P.E. James Prentice, QC**	**Carole T. Corcoran**
Commission Co-Chair	**Commission Co-Chair**	**Commissioner**

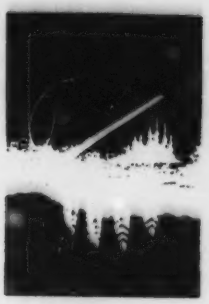
Dated this 27th day of March, 1997.

APPENDIX A

THE COMMISSION'S DECISION: RE MANDATE

Indian Claims Commission

Commission des revendications des Indiens



3629964 NOV 19 '96

November 18, 1996

Mr. Jerome N. Slavik
Ackroyd, Piasta, Roth & Day
Barristers & Solicitors
Fifteenth Floor
First Edmonton Place
10665 - Jasper Avenue
Edmonton, Alberta
T5J 3S9

Via fax: 403-423-8946

- And -

Mr. Francois Daigle
Counsel, Specific Claims Ottawa
DIAND Legal Services
1157 - 473 Albert Street
Ottawa, Ontario
K1A 0H8

Via fax: 613-991-5057

Dear Sirs:

Re: Mikisew Cree First Nation [Treaty Entitlement to Economic Benefits]
Our File: 2108-11-02

I am writing in regard to Canada's challenge to the mandate of the Commission to conduct an inquiry into this matter. Further to my verbal communication on September 17, 1996, Co-Chair Dan Bellegarde has carefully considered the written submissions of the parties and decided to proceed with the inquiry as requested by the Mikisew Cree First Nation (MCFN).

While due regard has been paid to the submissions of the parties, the principle of fairness was the governing factor in the decision to proceed with the inquiry. After considering the nature of the issues involved and the amount of time that this claim has been under review by the Specific Claims Branch, Co-Chair Bellegarde concluded that Canada has had sufficient time to determine whether an outstanding "lawful obligation" is owed to the MCFN. Under the circumstances, he considered the lengthy delay as being tantamount to a rejection of the claim for the purposes of determining whether they have authority to proceed with an inquiry under their terms of reference. He also felt that it would be unfair and prejudicial to the

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MCFN if they did not proceed with the inquiry because this could effectively deprive the MCFN from having its claim reviewed by an independent third party. Furthermore, the inquiry has been scheduled in such a manner as to provide Canada with additional time to respond to the merits of the claim before proceeding with written and oral submissions. If Canada decides to accept the claim, it will not be necessary for the Commission to complete the inquiry.

The chronology of this claim and the detailed reasons for the decision are set out below.

CHRONOLOGY OF THE CLAIM

1. January, 1993 - MCFN files specific claim to economic entitlements under Treaty 8 to Specific Claims West (SCW).

2. October 20, 1993 - SCW forwards a discussion paper providing Canada's preliminary analysis of the claim to Mr. Slavik.

3. March 29, 1994 - Allan Tallman, SCW advised Mr. Slavik that Canada's preliminary position is that the claim does not establish an outstanding lawful obligation on the part of Canada. Canada offers MCFN opportunity to provide additional evidence or written arguments to be taken into consideration.

4. July 15, 1994 - Parties meet to discuss Canada's preliminary position and new arguments are presented to SCW by the MCFN. Following this meeting, SCW agreed to conduct research into the implementation of the agricultural and farming provisions of Treaty 8.

5. January 30, 1995 - SCW circulates copy of draft report entitled "Economic Benefits and Treaty No. 8 Bands in Alberta 1899-1940"

6. May 5, 1995 - Chief Waquan wrote to Rem Westland, Director General, Specific Claims Branch (SCB) seeking decision on the claim.

7. June 12, 1995 - Letter from Rem Westland to Chief Waquan on a "without prejudice" basis acknowledging that "there may be an obligation under Treaty 8 to provide the articles specified in Treaty 8 to the MCFN." Mr. Westland offered the following two options to the MCFN on how to proceed: "The MCFN may pursue the specific claims process or can await the outcome of (and/or participate in) the developing Indian-Government process to determine how treaties should be understood and implemented in contemporary terms. Subject to your agreement and a formal letter accepting your claim from DIAND's Assistant Deputy Minister of Claims

and Indian Government, the Specific Claims Branch is prepared to enter into discussions concerning the First Nation's claim within the parameters of the Specific Claims Policy and DIAND's legal position."

8. August 2, 1995 - Letter from Manfred Klein, SCW, to Chief Waquan confirming that SCW would be prepared to negotiate a claim with MCFN subject to the conditions set out in the June 12th letter.

9. August 17, 1995 - Letter from Chief Waquan to Manfred Klein indicating the MCFN is prepared to enter into negotiations for settlement of the specific claim.

10. December 19, 1995 - Mr. Slavik requests response from acting Director General, Mike Bouliane, regarding the status of "acceptance package" of the claim.

11. January 22, 1996 - Letter from Chief Waquan to Deputy Minister Scott Serson requesting meeting to discuss why the claim had not been accepted. Chief Waquan states that Mr. Bouliane advised the MCFN before Christmas that consideration of the claim had been upheld "for a number of so-called policy reasons" and that Mr. Bouliane had expressed concerns regarding the "precedent affect" and the potential "cost to Canada" if the claim were accepted for negotiation.

12. February 7, 1996 - Letter from Mike Bouliane to Chief Waquan stating that the "processing of the acceptance package is being held in abeyance" while the issue of entitlement to economic benefits was "under active review by the department from a policy perspective." Mr. Bouliane stated that he expected a decision from the department within a period of three months.

13. February 23, 1996 - Letter from Jerome Slavik to the Indian Claims Commission requesting an inquiry into "deemed rejection" of the claim.

14. June 12, 1996 - Letter from Francois Daigle to Isa Gros-Louis Ahenakew, ICC, objecting to the Commission proceeding with the inquiry because "Canada does not agree or admit that the claim had been rejected."

15. June 14, 1996 - At ICC Planning Conference in Ottawa, Francois Daigle objects to mandate of Commission to proceed with inquiry. In a letter on that date, Mr. Michel Roy, Director General of Specific Claims Branch, reiterated that the review of the claim had been "held in abeyance pending a review of the issue by the department from a policy perspective. Although the intention was to complete the review within three months, circumstances have not allowed us to do so." Mr. Roy advised that he was

"fully committed to having it reviewed by senior officials of the department."

16. June 27, 1996 - Letter from Michel Roy to Jerome Slavik responding to proposal made during the June 14th Planning Conference. Mr. Roy states that "Unfortunately, this Department is not in a position to advise before July 31, 1996 whether your client's claim will or will not be accepted for negotiation pursuant to the Specific Claims Policy. We are also unable to agree that this claim be 'deemed' rejected for the purposes of an inquiry by the Indian Claims Commission." Mr. Roy reiterated that the claim was under active consideration by the department.

17. July 24, 1996 - Letter from Chief Waquan to Michel Roy stating that the MCFN was "disappointed" that after three and a half years DIAND was continuing to procrastinate and delay acceptance of the claim.

Positions of the Parties on the Mandate of the Commission

In Canada's written submissions dated August 1, 1996 Mr. Daigle submitted that the question of whether the Commission has a mandate to conduct an inquiry into this claim could be determined on a preliminary basis since the issue of rejection is not inextricably tied to the substantive aspects of the claim. For the purposes of determining this preliminary question, Mr. Daigle stated that the Commission cannot "deem" a claim to be rejected; rather, the relevant question is "whether Canada's conduct is tantamount to a rejection." In Canada's submission, it is not.

Mr. Daigle provided a brief recitation of the terms of reference contained in the Order in Council establishing the Commission and the salient facts in support of his assertion that the Commissioners do not have a mandate to proceed with an inquiry into this matter because it has not been rejected. Mr. Daigle referred to two previous decisions of the Commission to proceed with inquiries (the Athabasca Denesuline and the Lac La Ronge Indian Band) as support for the view that there must be a "rejection of the claim on its merits" before the Commission can proceed with an inquiry. While Mr. Daigle acknowledged that Canada's preliminary review of the claim in March 1994 did not disclose an outstanding lawful obligation, he stated that further evidence and arguments have been presented to the Department and no decision has been made conclusively one way or another. The crux of Canada's argument is that the claim has simply not been rejected. According to Mr. Daigle, "DIAND has not completed its review of the claim and has not yet determined whether, on its merits, the claim should be accepted or rejected pursuant to the Specific Claims Policy."

The Mikisew Cree First Nation's position is set out in a letter from Mr. Jerome

Slavik to the writer dated August 15, 1996. Mr. Slavik asserts that there is ample case authority to support the view that administrative bodies created under statute have the requisite authority and discretion to make decisions with respect to their jurisdiction, subject to judicial review of such decisions. While the Commission must satisfy itself that a claim has been rejected by the Minister before it can proceed with an inquiry into the claim, Mr. Slavik asserts that the ICC has the authority to determine what constitutes a "rejection". Aside from an express rejection in writing or verbally, Mr. Slavik suggests that a rejection can be based on "the action, inaction, or other conduct, such as the refusal or inability to make a decision of the Crown within a reasonable period of time, which is tantamount to a rejection, despite claims to the contrary."

Mr. Slavik stated that where a claim has been before the Crown for a reasonable period of time and no decision has been made, it is necessary to conclude at some point that the claim has essentially been rejected in order to allow the First Nation to pursue other alternatives. Although not directly applicable to the particular facts and circumstances before the Commission, Mr. Slavik referred to three cases dealing with applications for *mandamus* to compel a public authority to make a decision. In *Austin v. Minister of Consumer and Corporate Affairs* (1986), 12 CPR (3d) 190, the court held that, despite the absence of a statutory time limit, an authority under a legal duty to make a decision must do so within a reasonable period of time. In *Bhatnager v. Minister of Employment*, [1985] 2 FC 315 the court issued an order of *mandamus* requiring that the department make a decision on an immigration application by a certain date. While the court could not order the department to decide the outcome in a particular manner, it could issue *mandamus* owing to the lengthy delay in making the decision and the absence of an adequate explanation for the delay. Finally, Mr. Slavik cited *Ermineskin Band Council v. Registrar of Indian and Northern Affairs* [1987] 2 CNLR 70 where the court found that the Registrar was under a statutory duty to make a decision in regard to a membership protest filed by the Band. Mr. Justice Strayer stated that "*While there has been no express rejection of this demand, more than enough time has passed for a response and none has been forthcoming. This is tantamount to a refusal to decide.*" Therefore, Strayer J. concluded that by "refusing or failing to give a decision on either of these protests, the Registrar is preventing an appeal to a court at his interpretation of the law. I am not able to conclude that Parliament intended such a result." In *Ermineskin*, the delay involved was slightly less than two years from the time when the Band filed its first objection to the Registrar. Mr. Slavik submitted that the facts in this case are similar because the MCFN might be deprived of an opportunity to have the claim reviewed by the Commission given that the mandate expires on March 31, 1997.

THE COMMISSIONERS' REASONS

As mentioned previously, the Commission has decided to proceed with an inquiry into this matter. However, oral submissions will be scheduled to proceed no earlier than January of 1997. Taking into account the case authorities cited above it is clear that, while they have no direct application because the Commission cannot provide discretionary remedies like a court of equity, they are instructive on the question of whether Canada's delay in responding to the merits of the claim is tantamount to a rejection. Further support for the decision to proceed with the inquiry on account of lengthy delay can be found in the following authorities.

In *Re Friends of Oldman River Society* (1993), 105 DLR (4th) 444 (F.C.T.D.) the court offered its views on what constituted a reasonable period of time for a decision to be exercised under statute. The court held that the complexity of the subject matter has a direct bearing on whether there has been unreasonable delay under the circumstances. The court declined to order *mandamus* to compel the Minister of Transport to implement the recommendations of an environmental assessment panel since only 14 months had lapsed since the release of the panel's report and recommendations. The court held that there had been no unreasonable delay but remained seized of the matter to ensure that some forward progress was achieved.

In *R. v. Stapleton* (1983), 6 DLR (4th) 191 (N.S.C.A.) -- a Charter case involving an application to have criminal charges dismissed on the grounds that there had been unreasonable delay in bringing the matter to trial -- the court held that prejudice was a relevant factor in determining whether there was unreasonable delay. Also, the court stated that what constitutes a reasonable time depends on the circumstances.

In *Re Delmas and Vancouver Stock Exchange* (1994), 119 DLR (4th) 136 (BCSC) the court dealt with an application for prohibition and *certiorari* challenging the jurisdiction of the Vancouver Stock Exchange to proceed with disciplinary proceedings against the applicant. While a great deal of curial deference will be shown to bodies such as the Stock Exchange because of the highly specialized nature of the functions it performs, this case seems to suggest that the courts are generally reluctant to grant prerogative relief against the decisions of tribunals and administrative bodies. Although it is acknowledged that this case is not directly on point, it provides support for the view that the Commission can determine whether unreasonable delay is tantamount to a rejection of claim and that such decisions will generally be respected by the courts.

The Commission decided to proceed with the inquiry because Canada has had a reasonable period of time to respond to the merits of the claim. It is significant that the Specific Claims Branch initially offered to enter into negotiations with the

MCFN under the policy on June 12, 1995 subject to a formal letter of acceptance from DIAND Assistant Deputy Minister of Claims. Over seventeen months have passed and Canada has yet to respond to a discrete legal question, namely, whether the MCFN received any of the economic entitlements promised under Treaty 8. While the Commission appreciates that there are interpretive questions relating to the nature and scope of the treaty right, these issues are more properly the subject matter of settlement discussions.

The simple question is whether there are unfulfilled treaty obligations within the meaning of the Specific Claims Policy. Canada's delay in responding to the merits of this claim is not warranted under the circumstances because the delay appears to be related to issues which are extraneous to whether Canada has fulfilled its lawful obligations under Treaty 8. Simply put, questions related to the "precedent affect" or "potential cost to Canada" do not bear any relationship to the legal question in this matter. Even if the Commission were to conclude that it was justifiable for Canada to consider the broader policy implications of accepting the claim, the apparent lack of clarity in the policy (which was developed 14 years ago) cannot provide a justifiable reason for the patent delay in this case.

Given the narrow legal and factual questions before the Commission, there is no apparent reason why the Specific Claims Branch has not been able to accept or reject the claim within a period of seventeen months. In February 1996, the Specific Claims Branch itself estimated that the review would be completed within three months when the MCFN first pressed for a decision on the claim. The claimant has provided enough information for Canada to make a decision and, indeed, no further requests for information have been made by Canada. Since Canada refused to provide a certain date within which to respond and has not offered any valid explanation for the delay, other than to say that it is under active review, it is justifiable to conclude that a seventeen month delay is tantamount to a rejection of the claim for the purposes of responding to the MCFN's request for an inquiry.

Finally, questions of fairness and prejudice have been taken into account. First, the Commission's decision to proceed with the inquiry is not manifestly unfair or prejudicial to Canada. Although the Commission will hear community testimony on November 26, 1996 from the MCFN, written and oral submissions will not proceed until January 1997 at the earliest. The timing of the Commission's inquiry into this matter provides sufficient time for the Specific Claims Branch to consider the matter and make a decision on whether to accept the claim for negotiation.

While the Commission's decision to proceed with the inquiry will require that Canada expedite its internal review of the claim, they felt obligated to proceed with the inquiry as requested. The MCFN is simply requesting a timely response from Canada on the merits of the claim. If the claim is not accepted for

negotiation, the MCFN would then be in a position to seek an inquiry before the Commission or commence legal proceedings in the courts as a manner of seeking redress. To not proceed with the inquiry would occasion further delay and could frustrate the efforts of the MCFN to have their claim reviewed by an independent third party. Any further delay could effectively prevent an appeal to the Commission before March 1997 and could also prejudice the MCFN's ability to seek a legal remedy through the courts if the claim is ultimately barred through limitations periods or the doctrine of laches. In the Commission's view, such a result would not be fair in view of the narrow issue that is before Canada and the Commission.

If you have any questions or comments in regard to any of the above, please feel free to contact me at 613-947-3945.

Sincerely yours,

Ron S. Maurice
Commission Counsel

cc: Chief Waquan, Mikisew Cree First Nation, Via fax: 403-697-3826
Mr. Michel Roy, Director General. SCB, Via fax: 994-4123
Commissioners Bellegarde, Prentice and Corcoran

APPENDIX B

OFFICIAL NOTICE THAT CANADA WOULD NEGOTIATE THE CLAIM

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

December 16, 1996

WITHOUT PREJUDICE

Chief Archie Waquan
Mikisew Cree First Nation
P.O. Box 90
FORT CHIPEWYAN AB T0P 1B0

Dear Chief Waquan:

On behalf of the Government of Canada, and in accordance with the Specific Claims Policy, I offer, as set out below, to accept for negotiation of a settlement, the Mikisew Cree First Nation's (MCFN) specific claim regarding the MCFN's entitlement to the agricultural provisions of Treaty No. 8.

For the purpose of negotiations, Canada accepts that the MCFN has sufficiently established that Canada has a lawful obligation within the meaning of the Specific Claims Policy, with regard to the claim.

The steps of the claims process which will be followed hereafter include: conclusion of a negotiating protocol accord; negotiations toward a settlement agreement; drafting a settlement agreement; concluding the agreement; ratifying the agreement; and finally, implementation of the agreement.

Throughout the process, Canada's files, including all documents submitted to Canada concerning the claim, are subject to the Access to Information and Privacy legislation in force.

All negotiations are conducted on a "without prejudice" basis. Canada and the band acknowledge that all communications, oral, written, formal or informal, are made with the intention of encouraging settlement of the dispute between the parties only, and are not intended to constitute admissions by any party.

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Canada

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The acceptance of the claim for negotiations is not to be interpreted as an admission of liability or fact by Canada. In the event that no settlement is reached and litigation ensues, Canada reserves the right to plead all defences available to it, including limitation periods, laches and lack of admissible evidence.

In the event that a final settlement is reached, the settlement agreement must contain a release from your band ensuring that this claim cannot be reopened. As part of the settlement, Canada will also require an indemnity from your band.

The federal negotiator, Mr. Ian Gray, has been designated to work with you on resolving this claim. I send my best wishes and I am optimistic that a fair settlement can be reached.

Yours sincerely,

John Sinclair
Assistant Deputy Minister
Claims and Indian Government

c.c.: Jerome Slavik